

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For The Period
From January 1, 1956
Through March 31, 1856
VOLUME 82

JOHN PATTERSON, Attorney General

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QUARTERLY REPORT
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**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1956, through March 31, 1956, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

JOHN PATTERSON,
Attorney General.

JOHN PATTERSON

Attorney General

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January 20, 1956

Hon. Peter A. Brannon, Chairman
State Records Commission
Department of Archives and History
CAPITOL

Archives and History, Department of—Records—Statutes.

1. Act No. 565, General and Local Acts 1955, page 1227, is a lawful exercise of legislative power.
2. An act which contemplates destruction of certain records after they have been photographed or microfilmed does not repeal an act which permits destruction of public records under other circumstances.

Opinion by Assistant Attorney General Bridges.

Dear Mr. Brannon:

Your request for an official opinion, bearing date of November 4, 1955, is as follows:

"The State Records Commission at the meeting held November 3rd in my office, passed a resolution to request a ruling by you as to the legality of Act No. 565, of the Regular Session of 1955, a copy of which is herewith attached.

"Secondly, the resolution also requests your opinion as to whether Section 12, of this Act abrogates or nullifies those previously passed enactments of the Legislature which require the Department of Archives and History to determine with the head of the office concerned as to the advisability of the destruction of certain State records. In the past, the Director of the Department of Archives and History has after a request by the head of the office concerned consented or refused to approve in writing. When consent was given for the destruction of material then it has been required that the officer of the original Department must transmit a detailed and separate list or catalog of those materials destroyed and this was filed as a part of the archives of that office.

"If you will render an opinion in compliance with the above, the courtesy will be appreciated."

Act No. 565, General and Local Acts 1955, page 1227, concerns the management of public records of the State or any political subdivision thereof; provides for the photographing or the microphotographing of public records and for the admission in evidence of photographed or microphotographed copies of records required to be kept by public officers; provides for the pur-

chase or lease of equipment to carry out the provisions thereof; and creates a State records commission and a county records commission to regulate the destruction or disposal of such records.

It is my opinion that this act is a valid and lawful exercise of legislative power; to my knowledge, it contravenes no constitutional provision. Cf. Quarterly Report of Attorney General, Vol. 76, page 22.

It is my conclusion, from a careful inspection of the provisions of Act No. 565, supra, and of Act No. 293, General Acts 1945, page 486, that the only parts of Act No. 293, supra, which could conceivably be construed as in conflict with any of the provisions of Act No. 565, supra, are those which deal with the destruction of records. Section 3 of Act No. 295, supra, and Sections 6 and 8 of Act No. 565, supra, both have provisions concerning the destruction of records. These specific sections are as follows:

Act No. 565, supra, Section 6:

"The state records commission shall be charged with the responsibility of determining which state records shall be permanently preserved because of historical value, and which state records may be destroyed or otherwise disposed of after they have been microfilmed. The commission may classify the different types of records accordingly. No state officer or agency head shall cause any state record to be destroyed or otherwise disposed of without first obtaining the approval of the state records commission."

Act No. 565, supra, Section 8:

"The county records commission shall be charged with the responsibility of determining which county records shall be permanently preserved because of historical value, and which county records may be destroyed or otherwise disposed of after they have been microfilmed. The commission may classify the different types of records accordingly. No county official shall cause any county record to be destroyed or otherwise disposed of without first obtaining the approval of the county records commission."

Act No. 293, supra, Section 3:

"Any public records, books, papers, newspapers, files, printed books, manuscripts or other public records which have no significance, importance, or value, may, upon the advice and recommendation of the custodian thereof and upon the further advice, recommendation and consent of the Director of the Alabama State Department of Archives and History be destroyed or otherwise disposed of. The Department of Archives and History is hereby authorized and empowered to make such orders, rules, and regulations as may be necessary or proper to carry the provisions of this section into effect."

In order for a subsequent statute to repeal a prior one, the repugnance between the two statutes must be glaring and irreconcilable and the two statutes must not be able to stand together. **Bates v. State, ex rel. Conniff**, 240 Ala. 609, 200 So. 779. Where there is a reasonable field of operation by a just construction of both statutes, both will be given effect.

It is my opinion that none of the provisions of Act No. 293, supra, were repealed by the adoption of Act No. 565, supra. It appears affirmatively from the quoted provisions of Act No. 565, supra, that the Legislature intended to provide for the destruction of certain records **after they have been micro-filmed**, whereas Section 3 of Act No. 293, supra, provides that certain records, upon the advice and recommendation of the Director of the State Department of Archives and History, may be destroyed or otherwise disposed of without any reference to microfilming of said records. It is my opinion that both statutes have a field of operation, and, therefore, the latter does not repeal any part of the former.

Yours very truly,

JOHN PATTERSON
Attorney General

January 23, 1956

Hon. Ira D. Pruitt
Hon. Karl C. Harrison
Hon. Bill Gilchrist
Members Special Committee
House of Representatives
C A P I T O L

State and State Departments—Legislature—Senate—
House of Representatives.

1. Section 58, Constitution of Alabama 1901, providing that neither House shall, without the consent of the other, adjourn for more than three days, is applicable to an adjournment sine die.
2. The House of Representatives may not constitutionally adjourn sine die without the concurrence of the Senate.
3. A majority of the members of the House of Representatives may elect a temporary Speaker and Clerk to transact its business in the absence of the Speaker of the House and the Speaker Pro Tempore and the Clerk.

Opinion by the Attorney General.

Gentlemen:

On January 20, 1956, the House of Representatives of the State of Alabama met pursuant to an adjournment resolution passed on January 17, 1956, which said adjournment resolution provided that the House would reconvene on Friday, January 20, 1956. The House was duly called to order and proceeded to its regular order of business. When the order of business reached the point of report of standing committees, the Rules Committee gave a favorable report to HJR 6, which said resolution dealt with the calling of a constitutional convention to rewrite the organic law of the state. The journals of the House show that this resolution was defeated. Thereupon, the Rules Committee continued its report and gave a favorable report to HJR 17, which said resolution offered by Representatives Boyd and Nettles in effect provided that, with the concurrence of the Senate, the adjournment of the Legislature upon completion of business of that day would be a sine die adjournment. This resolution was called up for vote, and upon a voice vote the Speaker of the House of Representatives declared that the resolution was adopted.

In the regular order of business, the House, by message, advised the Senate that HJR 17 had been passed by the House. Upon reading the House Message by the Reading Clerk of the Senate, it was moved by Senator Lamberth that the rule of the Senate be suspended and that the resolution be put upon its immediate passage. There was an objection of this motion and under the rules of the Senate the resolution was referred to the Rules Committee. There was no further action in the Senate on HJR 17. However, on motion made the Senate refused to adjourn sine die but did adjourn until Monday, January 23, 1956.

Shortly after the purported passage of HJR 17 by the House, Representative Dawkins moved that the House of Representatives adjourn sine die. This motion did not ask for Senate concurrence. The motion was put to the House by voice vote, and was declared passed by the Speaker. He declared that the House of Representatives was adjourned sine die.

Upon the announcement of the outcome of the vote on the Dawkins' motion, various members of the House of Representatives were seeking recognition for the purpose of testing the accuracy of the Speaker's ruling by appealing from his ruling or by seeking to have the Speaker call for a division, or by some other proper parliamentary proceeding to determine whether or not the Dawkins' motion had received a majority vote of those voting thereon.

The Speaker did not recognize any such members. Immediately after announcing the result of the vote he declared that the House of Representatives was adjourned sine die and thereupon left the Chamber.

A majority of the members of the House, i.e., 61 in number, remained in the House Chamber. It is to be noted at this point that the regular Clerk

of the House was sick and unable to be in attendance and that the Speaker pro tempore was absent and was not in attendance on January 20, 1956.

After the Speaker of the House had left the Chamber some of the members of the House who remained in the Chamber attempted to locate the Speaker and to have him return as presiding officer. They were either unable to locate or find him or to secure his return to the Chamber of the House of Representatives.

Thereupon, the remaining 61 members of the House of Representatives proceeded to elect Representative Paul Meeks as temporary Speaker of the assembly; all of the subordinate clerks of the House having absented themselves therefrom, the remaining majority of the House then proceeded to elect Representative Kendall as temporary Clerk of the House.

A motion was then made to appeal from the Chair's ruling on the adoption of the Dawkins' motion to adjourn sine die, and upon a vote being taken the appeal was sustained.

A resolution was offered by one of the remaining majority of the House that the Senate be requested to return to the House HJR 17 for further consideration. A record vote was taken upon this resolution and the same was adopted.

Thereupon a motion was made and passed by the majority of the House of Representatives that said body adjourn to meet again on Monday, January 23, 1956, at 11:00 a. m.

You, Gentlemen, as the Special Committee of the House of Representatives appointed by temporary Speaker Meeks, have outlined to me the above transactions, and requested my opinion on the following questions growing out of said facts:

1. Can the House constitutionally adjourn sine die without the concurrence of the Senate?
2. In the absence of the Speaker of the House and the Speaker pro tempore and the Clerk, can a majority of the members of the House elect a temporary Speaker and Clerk to transact the business of the House?
3. Assuming that the regularly elected Speaker of the House and the regularly elected Speaker pro tempore do not appear in the House on Monday, January 23, 1956, what procedure should be followed by the remaining majority of the members?
4. Did the House of Representatives legally adjourn until 11:00 a. m., Monday, January 23, 1956?

In my opinion, your first question should be answered in the negative.

Section 58, Constitution of Alabama 1901, provides as follows:

"§58. Neither house shall, without consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting except as otherwise provided in this Constitution."

In an advisory opinion, **In re Opinion of the Justices**, 254 Ala. 179, 47 So. 2d 642, the Supreme Court of Alabama, held that Section 58, *supra*, does have application to an adjournment *sine die*. In that case it was held that the Senate of Alabama could not adjourn *sine die* without the consent of the House of Representatives, thereby terminating a session of the Legislature.

It is my opinion, that this case is directly in point and, along with said Section 58, *supra*, ample authority for the negative answer to Question One.

In the note **Re Legislative Adjournment**, 22 L.R.A., page 716, it is pointed out that practically all other states have similar constitutional provisions as those contained in Section 58, *supra*. For instance, as stated in the case of **In re Opinion to Governor**, 85 Atl. 1056, 35 R.I. 166:

"Section 9 of article 4 of the Constitution, in expressly limiting the power of adjournment of each house to not more than two days without the consent of the other house, in effect implies that the General Assembly, after once being lawfully in session, can only adjourn by the joint action of the two houses, each house may, at its convenience, adjourn itself from time to time for the period not exceeding two days, irrespective of whether the other house may have adjourned for the same time or not; but the General Assembly, as such, would not be adjourned by such independent acts of the two houses. As already stated, it can only adjourn by the joint or concurrent action of both houses."

Based on the above authorities and those hereinafter cited, the motion made by Representative Dawkins to adjourn the House of Representatives *sine die* without the concurrence of the Senate, violated Section 58, *supra*, and was, therefore, null and void. **In re Opinion of the Justices**, 254 Ala. 179, 47 So. 2d 642; Section 58, Constitution of Alabama 1901; **State ex rel Fox v. Alt.**, 26 Mo. App. 673; Section 7, Par. 2, page 35, **Mason's Manual of Legislative Procedure** (1953).

The House of Representatives, under the Dawkins' motion to adjourn *sine die*, was not legally adjourned and was in session when the Speaker left the Assembly room. The majority of the members of the House of Representatives constituting a legal quorum, remained and elected a temporary Speaker and proceeded to transact business, which it had a legal right to do. **Pevey v. Aylward**, 91 N.W. 315.

It therefore follows that your second question must be answered in the affirmative.

In **Robertson v. The State**, 130 Ala. 164, 30 So. 494, the Supreme Court of Alabama, in dealing with the right of the House of Representatives to elect a temporary speaker, said:

"... in all cases, we apprehend, where in the judgment of the house it becomes necessary to the transaction of legislative business for a speaker **pro tempore** to be chosen and installed, the house may elect one of its members to discharge all the duties of the office of speaker for a time commensurate with the necessity, and such temporary speaker is 'the presiding officer' of the house, who is authorized by section 27, article IV, of the constitution to sign bills, etc.—9 *Jefferson's Complete Works*, p. 17; 3 *Lalor Cy.*, p. 91; *Cushing's Law & Pr. of Leg. Assemblies*, § 313 ... " (Emphasis supplied).

In addition to the above it is stated in **Mason's Manual of Legislative Procedure** (1953), Section 576, Par. 3, page 415, that:

"The presiding officer cannot prevent the transaction of business by leaving the chair or leaving the meeting. In either instance the members can elect a temporary presiding officer and proceed. If a member properly questions the presiding officer's ruling on a motion to adjourn, it is his duty to resolve the question or take a division before declaring an adjournment and, upon his failure to do so, a temporary presiding officer can be elected and the business can proceed in proper order."

To like effect is the case of **State ex rel. Fox v. Alt.**, *supra*, where the facts are very similar to those here presented.

Also to like effect is the statement appearing in Section 314, of **Cushing's Legislative Assemblies**, which is as follows:

"... but where the presiding officer is a member of the body of which he presides, the right to supply his place temporarily is admitted without any expressed provision, to that effect, either of constitution or law, or by a rule of the assembly."

This statement from **Cushing's Legislative Assemblies** was cited, with approval, by the Supreme Court of Alabama, in **Garner v. Jefferson County**, 234 Ala. 412, 175 So. 352; and in **Opinion of the Justices**, 237 Ala. 62, 185 So. 376.

It results, therefore, in my opinion, that whenever a majority of the House of Representatives, being in lawful session, deems it necessary to elect a temporary speaker and clerk, so that the business of the House may be transacted, it may constitutionally do so. It appears from the facts stated

by you that a majority of the House has determined that this necessity exists.

In answer to your Question Three you are advised that, if neither the regularly elected Speaker of the House nor the regular Speaker pro tempore appears in the House Chamber on Monday, January 23, 1956, at 11:00 a. m., and the House desires to transact business and provided a quorum is present the House should proceed to elect a temporary Speaker and a temporary Clerk, if the regularly elected Clerk of the House is absent. The persons so elected should be elected to serve for the remainder of this session of the legislature, or until the regularly elected Speaker or the regular Speaker pro tempore or the regularly elected Clerk resume the duties of their office.

In answer to Question Four, premises considered, you are advised that in my opinion the House did legally adjourn on Friday, January 20, 1956, until Monday, January 23, 1956, at 11:00 a. m., and that the legislature of Alabama has not constitutionally adjourned sine die.

In conclusion it should be borne in mind that legislative power is not derived from State or Federal Constitution. These instruments are only limitations upon the power. Apart from limitations imposed by these fundamental charters of government, the power of the Legislature is plenary, unlimited and has no bounds. **Alabama State Federation of Labor v. McAdory**, 246 Ala. 1, 18 So. 2d 810. **In re Opinion of the Justices**, 248 Ala. 590, 29 So. 2d 10.

Very truly yours,

JOHN PATTERSON

Attorney General

January 26, 1956

Hon. M. D. Tingle
Chairman of The Board of Revenue & Control
Chilton County
Clanton, Alabama

Elections—Absentee Ballots—Registers—Compensation.

1. Section 17 of Act No. 733, General and Local Acts 1953, page 993, amending Section 17 of Act 424, General and Local Acts 1949, page 601, as amended by Act No. 921, General and Local Acts 1951, page 1570, is inoperative during the term of office of a

register who took office January 18, 1953, for the reason that it violates Amendment No. XCII to the Constitution of Alabama 1901.

2. When three elections are held on the same day (other than municipal elections held at a time different from a primary or general election), as in the instant case, under the provisions of Section 17 of Act No. 424, General and Local Acts 1949, page 601, as amended by Act No. 921, General and Local Acts 1951, page 1570, the Register of the Circuit Court of Chilton County is entitled to the compensation provided by said section for her services in handling the absentee ballots for each of the three elections.

Opinion by Assistant Attorney General Baker.

Dear Sir:

Your request for an official opinion bearing date of November 3, 1955, is as follows:

"As Chairman of The Board of Revenue and Control of Chilton County, Alabama, its governing body, I request your official opinion on the following questions:

"Under Act No. 424, General & Local Acts of 1949, Page 601, Section 17, it is provided as follows:

"Section 17. For his services under this Act during the twenty days prior to each election to which this Act pertains and for his services on the day of the election, the register, or person acting in his stead, shall be paid the sum of ten dollars (\$10) daily. Such payment shall be made from the county treasury, ' Which Act became effective November 1, 1949.

"On November 7, 1951 the Attorney General, Hon. Si Garrett, rendered an opinion to the Hon. John A. Williams, Circuit Clerk and Register of Chambers County, Alabama, Attorney General's report of October 1, 1951-December 31, 1951, in which he ruled that under Section 17 of said Act No. 424, the Register is entitled to compensation provided by said Section for his services in handling absentee ballots for each election where the elections were held on the same day.

"The Register of the Circuit Court of Chilton County, Alabama was appointed and took office as such Register on January 18, 1953 for a term of six years.

"On September 17, 1953, Act No. 733, Acts of Alabama Regular Session of 1953, Volume II, Page 993, amended Section 17 of said Act No. 424 of 1949 so as to read as follows:

"Section 17. The court of county commissioners, board of revenue or other governing body of the county shall determine the amount of compensation to be paid to the register for the performance of his duties in connection with absentee ballots during the twenty days prior to each election to which this act applies and for his services on the day of election, but such compensation shall not exceed ten (\$10) per day. The compensation hereby prescribed shall be the total compensation allowed the register for the performance of duties relative to absentee ballots in all elections held on the same day, and shall be paid from the county treasury, except in case of a municipal election held at a time different from a primary or general election, in which event payment shall be from the city or town treasury. Provided, no municipal employee shall be compensated for his services in this regard."

"By resolution duly spread upon the minutes of the Governing Body of Chilton County, Alabama the Register's compensation for services rendered in connection with handling absentee ballots was fixed at \$10.00 per day.

"Under Constitutional Amendment No. 92, Code of Alabama of 1940, 1953 Cumulative Pocket Part, Page 114, it is provided in substance as follows: 'Nor shall the legislature, or any county of the state in any manner or by any means, decrease, or authorize the decrease of, the salary, fees or other compensation of any officer of the state or any county of the state, who is elected or appointed for a fixed term, during the term for which he is elected or appointed, regardless of whether such officer may be removed at the pleasure of the authority electing or appointing him or only upon impeachment.'

"On November 2, 1954 there was held in Chilton County, Alabama the following elections: 1. General Election 2. Constitutional Amendment Election 3. To authorize construction of new courthouse in Chilton County, Alabama.

"In each of the three above elections absentee ballots were voted and the Register of Chilton County performed duties in connection with each election for twenty-one days under said Act No. 424.

"1. If the Register of Chilton County is protected in her fees and compensation by Section 92 of the Constitution of Alabama, would the amendment of 1953 of Section 17 be applicable to her compensation in connection with her duties in handling absentee ballots for said three elections held on the same day before the expiration of her term of office?

"2. Was the Register of Chilton County entitled to receive \$630.00 or \$210.00 for her services rendered for said three elections held on November 2, 1954?

"3. What compensation will the Register of Chilton County be entitled to for services rendered in connection with elections to be held between this date and the expiration of her term of office?

"4. Is Section 17 of Act No. 733, Acts of Alabama, Regular Session 1953, Volume II, Page 933, authorizing the Governing Bodies of the counties to determine the amount of compensation to be paid to the Register for duties in connection with absentee ballots unconstitutional and in violation of Section 92 of the Constitution of Alabama of 1901 or other constitutional provisions? If not,

"5. Will it be applicable to a Register of Chilton County whose term of office began before September 17, 1953?"

When the Register of the Circuit Court of Chilton County began the present term of office on the 18th day of January, 1953, Section 17 of Act No. 424, General and Local Acts 1949, page 601, as amended by Act No. 921, General and Local Acts 1951, page 1570, was in full force and effect. Amendment No. XCII to the Constitution of Alabama 1901 prohibits the decrease by any method in the salary, fees or compensation of any officer during the term for which he is elected or appointed.

Under Sections 68 and 281 of the Constitution of Alabama 1901, extra compensation or an increase in compensation was permitted where there were imposed new and additional duties foreign to the office. *Tayloe et al. v. Davis et al.*, 212 Ala. 282, 102 So. 433; *Kendrick et al v. Boyd*, 35 Ala. App. 592, 51 So. 2d 697; Quarterly Report of Attorney General, Vol. 59, page 29. However, under the provisions of Amendment No. XCII, Constitution of Alabama 1901, there can be no decrease, in any manner or by any means, in the salary, fees or compensation of any elected or appointed county official during the term for which he is elected or appointed. In the instant case, the Legislature cannot decrease the salary, fees, or compensation of the register during the present term of office without violating Amendment No. XCII, supra; therefore, it is my opinion that during the present term of office of the Register of the Circuit Court of Chilton County, her compensation is governed by Section 17 of Act No. 424, as amended, supra, because Section 17 of Act No. 733, General and Local Acts 1953, page 993, further amending Act. No. 424, was enacted after the term of the register began in January, 1953. Section 17 of Act No. 733, supra, is inoperative during the present term of office of the Register of the Circuit Court of Chilton County, which term will expire in January, 1959. *State Docks Commission et al. v. State ex rel. Jones*, 227 Ala. 521, 150 So. 537; *Hawkins v. Jefferson County*, 233 Ala. 49, 169 So. 720; Opinions of the Attorney General, Office Edition, Vol. 5, page 340.

It is my opinion that the compensation for services as an absentee election manager should be governed by Section 17, Act 424, General and Local Acts 1940, page 601, as amended by Act No. 921, General and Local Acts 1951, page 1570; therefore, the compensation of the register should be

ten dollars per day for the twenty-one days for each of the three elections held on the same day. Quarterly Report of Attorney General, Vol. 57, page 93; Quarterly Report of Attorney General, Vol. 65, page 14.

In view of the foregoing, which answers your questions numbered 1 and 3, it is unnecessary to answer your questions numbered 2, 4 and 5.

Yours very truly,

JOHN PATTERSON

Attorney General

January 27, 1956

Hon. M. D. Foshee

Justice of the Peace

Precinct 4

Chilton County

Clanton, Alabama

Constitution of 1901—Constitutionally—Justices of Peace—
Inferior Courts.

1. Section 22 of Act No. 403, General and Local Acts 1955, page 941, and title of said act do not violate Section 45 of the Constitution of Alabama 1901.

2. Title of act creating inferior court held broad enough to cover provision requiring justice of peace warrants to be returnable to said court.

3. Title to act reciting "to establish a County Court for Chilton County, Alabama; to define its jurisdiction and power" held broad enough to cover provision in act requiring affidavits or warrants issued by justices of the peace to be made returnable to said court.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of January 19, 1956, is as follows:

"I am a duly elected Justice of Peace in and for Precinct 4 of Chilton County, Alabama. The City of Clanton is located in Precinct 4.

"On September 9, 1955, a Local Act Number 403 was passed by the Legislature abolishing the Chilton County Law and Equity Court and establishing the County Court for Chilton County, this act appears in Volume II of the Acts of 1955 commencing on Page 941.

"Section 22 of the Act provides for the commencement of prosecutions for crime and the last sentence of the Act is as follows: 'All affidavits or warrants for criminal or quasi criminal acts, of whatever kind issued by the Justice of Peace of Chilton County shall be returnable to this Court.'

"There is nothing in the title of this act with reference to criminal prosecutions before Justices of Peace being returnable to this Court. This appears to be a violation of Section 45 of the Constitution.

"I am writing in behalf of other Justices of Peace of the County and we would like to have your opinion as to whether or not the failure to include this matter in the title of the Act and whether or not the Legislature did validly deprive Justices of Peace of their jurisdiction to try misdemeanor prosecutions brought before them."

In my opinion, Section 22 of Act No. 403, General and Local Acts 1955, page 941, does not violate Section 45 of the Constitution of 1901.

As stated in your inquiry, Section 22 of Act No. 403, *supra*, which establishes a county court for Chilton County, Alabama, provides that "all affidavits or warrants for criminal or quasi criminal acts, of whatever kind issued by the Justices of Peace of Chilton County shall be returnable to this Court." Furthermore, the title of the act (No. 403, *supra*) contains no specific reference to the above quoted provision of Section 22 of said act. In my opinion, however, the title to Act No. 403 is broad enough to include the above quoted provision of Section 22, *supra*.

Acts of the Legislature depriving justice of the peace courts of criminal jurisdiction have been upheld by the Supreme Court of Alabama. **Gordon v. Medders**, 226 Ala. 576, 148 So. 135. An act which creates a court was considered in the case of **Ex parte Hickey**, 52 Ala. 228. In that case the title of the act was "An Act to establish the city court of Eufaula." The act itself provided that defendants residing in certain areas of the county could have their case removed to the city court from the circuit court, thereby depriving the circuit court of jurisdiction. It was contended that the title

of the act was not broad enough to cover such provision in the body of the act. However, the Supreme Court of Alabama held otherwise, stating that "the subject of the act necessarily embraces the jurisdiction which the court established shall exercise, the parties who can invoke, or who are subject to that jurisdiction, and the mode in which the jurisdiction shall be called into exercise."

Since the title to Act No. 403, *supra*, recites that Act No. 403 is an act "to establish a County Court for Chilton County, Alabama; to define its jurisdiction and power;" it is my opinion such recital in the title of the act is sufficiently broad enough to cover a provision requiring affidavits or warrants issued by justices of the peace to be made returnable to the newly created court. True, this provision has the effect of depriving justices of the peace of criminal jurisdiction, but in like manner the provisions in the act discussed in *Ex parte Hickey*, *supra*, deprived the circuit court of certain jurisdiction. In both instances, there was no recital in the title covering this specific provision.

In my opinion, therefore, Section 22 of Act No. 403, *supra*, and the title to said Act No. 403, *supra*, do not violate Section 45 of the Constitution of Alabama 1901.

Very truly yours,

JOHN PATTERSON

Attorney General

February 6, 1956

Hon. G. P. Thompson, Jr.
Mayor, Town of Midway
Bullock County
Midway, Alabama

Boards of Equalization—Municipalities—Officers and Offices.

1. No person may hold two offices of profit at one and the same time in this State, except notaries public.
2. A city councilman, who receives compensation, holds an office of profit.
3. A member of a county board of equalization holds an office of profit.

4. One cannot at one and the same time hold the office of city councilman and member of the county board of equalization.

5. The acceptance of an office of profit by a person already holding an office of profit operates as a vacation of the first office held.

6. A member of a county board of equalization is prohibited from holding employment or an office of profit with the United States, the State of Alabama, or any political subdivision of said State, by virtue of Title 51, Section 92, Code of Alabama 1940.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of January 20, 1956, is as follows:

"One of the City Councilmen here, was elected on Sept. 15, 1952, for a four year term.

At such time the remuneration for serving was fixed at \$1.00 for each meeting attended; this having been fixed by Council action.

"On Oct. 11, 1955, this councilman was appointed to the Board of Equalization for the County and has duly accepted the appointment.

"In view of these facts, I ask your opinion on the following:

"1. Can this individual hold and serve in both offices at one and the same time?

"2. If the answer to the first question is in the negative as being the holder of two offices of profit at one and the same time, can he waive his remuneration as city councilman and hold both offices?

"3. If the answer to both questions, one and two is in the negative, which office does said individual duly hold?"

By virtue of Section 280, Constitution of Alabama 1901, and Title 41, Section 5(7), Code of Alabama 1940, no person shall hold two offices of profit at one and the same time in this State, except notaries public.

A state, county, or municipal office, whether elective or appointive, carrying as a necessary incidence to its exercise some part of the sovereign power of the state, is an office of profit under this State within the meaning and

purview of the above constitutional and statutory provisions. *State ex rel. Glenn v. Wilkinson*, 220 Ala. 172, 124 So. 211; *State v. Sanders*, 187 Ala. 79, 65 So. 378.

A municipal corporation is an instrumentality of the state. Its functions are of a public nature and in its governmental functions, it administers some of the affairs of the state. *Carey v. City of Haleyville*, 230 Ala. 401, 161 So. 496. It is, therefore, obvious that a city councilman, who receives compensation, holds an office of profit within the meaning and purview of Section 280, *supra*. Cf. Quarterly Report of Attorney General, Vol. 32, page 154.

The powers and duties of county boards of equalization are prescribed by Title 51, Section 103, Code of Alabama 1940. It is clear that said boards exercise a portion of the sovereign powers of this State under Section 103, *supra*. Therefore, a member of a county board of equalization holds an office of profit in this State.

It is well settled that the acceptance of an office of profit within the meaning of Section 280, *supra*, by a person already holding another office within the field of operation of said section operates as a vacation of the first office held. *State ex rel. Camp v. Herzberg*, 224 Ala. 636, 141 So. 553.

In the light of the above discussion, your first inquiry is answered in the negative, since both the office of city councilman and member of the county board of equalization are offices of profit. Your second question is answered in the negative since the office of city councilman was vacated by operation of law when the person holding said office was appointed a member of the board of equalization. In answer to your third question, please be advised that the person mentioned in your letter now holds the office of member of the county board of equalization for the reasons discussed above.

This opinion is strengthened by the fact that Title 51, Section 92, Code of Alabama 1940, reads as follows:

"No member of any county board of equalization shall hold employment or office of profit with the United States, the State of Alabama, any county or other political subdivision of said state, or with any board, department or other agency of the United States, of the State of Alabama, of any county or other political subdivision of said state or with any county school board or with any municipality, while holding office as a member of said board."

Very truly yours,

JOHN PATTERSON
Attorney General

February 7, 1956

Hon. L. R. Driggers
City Clerk-Treasurer
The City of Dothan
Dothan, Alabama

Absentee Ballots—Elections—Judges of Probate—Municipalities—
Poll Tax and Poll Lists—Voters

1. Act No. 4, General and Local Acts 1951, page 43, prescribes the maximum number of days prior to an election within which an absentee voter may apply for a ballot.
2. An election is valid even if it is held at a time which will not allow an absentee voter the maximum number of days provided by law to apply for a ballot.
3. As much time as possible, not to exceed the time prescribed by law, must be allowed an absentee voter to apply for a ballot.
4. The judge of probate must prepare annually an official list of qualified electors by precincts or other subdivisions.
5. The official list of qualified electors must be published in a newspaper with a general circulation in the county in even numbered years.
6. A list of qualified electors for each voting place must be furnished the election inspectors at each election.
7. The lists of qualified electors which must be furnished election inspectors are made up from the official lists of qualified electors last prepared.
8. In municipal elections, it is the duty of the mayor to cause the lists of qualified electors to be delivered to the election inspectors.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of January 23, 1956, is as follows:

"A city primary election has been called for March 6, 1956, with the deadline for candidates to qualify fixed at 6 P. M. February 6, 1956, and

the run-off election, if necessary, set for March 20th, which obviously will not permit armed forces members the forty days allowed in Title 17, Section 64(23) of the 1940 Alabama Code for voting absentee ballots; nor would the run-off date even permit the 20 days allowed other absentee voters in the same section.

"Section 38(387), Title 17, provides for publication of lists of qualified voters in cities by wards or other subdivisions on the 15th day of April and a final supplement on the 1st of May in even years, which is the official list until a new list is published.

"Sections 1, 339, 340, 341, Title 17, all indicate application to municipal primary elections except that it would certainly be inconsistent or impracticable to hold them on the same date in May in some cities as those of the State and County. Any May date in even years would permit use of a recently published list of qualified voters, whereas the dates set for this one will require use of the official lists published in 1954 or a specially prepared list.

"Your opinion is requested as to:

"(1) Whether city funds can be legally used for holding elections, and (a) not allowing the required time for absentee ballots, (b) not held after May 1st and using the official list of voters referred to in Section 38(387) cited above.

"Your negative answer to the above question would obviously require a revision of dates to comply with the absentee voters law, and use of the official voters list published in May, and would obviate this further question.

"(2) Would publication be required of a list of voters especially prepared for the election so held prior to May 1st, at which time the official list would ordinarily be published."

I also have your letter of January 26, 1956, which reads as follows:

"Referring further to our telephone conversation on elections, about which we wrote you January 23rd, another point which adds to our confusion, is a part of Title 17, Section 90(3), which reads:

"The judge of probate shall prepare a separate, correct, alphabetical list of all the names of qualified electors or voters for each box or voting place, from the lists compiled and filed in the probate office, pursuant to sections 38 and 40 of title 17 of the 1940 Code of Alabama, for all elections hereafter held in this state whether primary, general, or special, of federal, state, district, county, or municipal and shall certify separately for each voting place, to the election officials appointed for holding the

election, each of said election officials shall be an elector qualified to vote only in the box at the place for which he or she is chosen to serve, a list containing only the names of the voters or qualified electors entitled to vote at such voting place.'

"Reference to Section 28, Title 37, referred to in the above section 90(3) concerning the mayor causing lists to be made, shows that this section 28 was repealed by Act No. 464 July 6, 1945."

By virtue of Act No. 4, General and Local Acts 1951, page 43, an absentee voter may apply for a ballot not more than 20 days nor less than 5 days prior to the election at which he desires to vote. A member of the Armed Forces of the United States, or his wife, may apply for an absentee ballot not more than 40 nor less than 5 days prior to the election at which he or she desires to vote.

As you point out, time will not allow a compliance with Act No. 4, supra, in the conduct of your city primary elections to be held on March 6, 1956, and on March 20, 1956.

I am of the opinion that said city primary elections will be valid even though absentee voters in said elections are not allowed as much time to apply for ballots as that prescribed by Act No. 4, supra. However, as much time as possible, not to exceed the time prescribed by Act No. 4, supra, should be allowed to absentee voters to apply for their ballots in all the elections. Cf. Quarterly Report of Attorney General, Vol. 20, page 156.

The second Democratic primary election held every two years in this State presents a situation similar to the one discussed above. Said election is always held 28 days after the first Democratic primary election. Title 17, Section 340, Code of Alabama 1940.

Title 17, Sections 38 and 40, Code of Alabama 1940, as amended by Act No. 482, General Acts 1947, page 331, prescribes the duties of the judge of probate in regard to the preparation, publication, and delivery of lists of qualified electors in the county. These duties are:

1. He shall, after the first day of February of each year, compare the official lists of registered electors with the poll tax lists, which have been furnished him by the tax collector and ascertain from such comparison the names of such persons on the official lists who have failed to pay any poll tax which is legally due, and by such comparison and other available information, he shall make a correct alphabetical list of all qualified electors registered by precincts or other subdivision.

2. He shall publish such list so made up in some newspaper with a general circulation in the county on or before the 15th day of April in even numbered years. No publication is required in odd numbered years.

3. He shall deliver or cause to be delivered a list of the qualified electors at each voting place to the election inspectors immediately preceding every election or primary.

By virtue of Section 38, as amended, *supra*, the list of qualified electors prepared by the judge of probate each year is the official list of said qualified electors until the next annual list is prepared. Such official list is used in preparing the list of qualified electors for each voting place which is required to be delivered to the election inspectors at each election or primary. It is not required that the list furnished election inspectors be published in a newspaper. Biennial Report of Attorney General, 1926-28, page 147. Quarterly Reports of Attorney General, Vol. 48, page 110, and Vol. 74, page 84.

Therefore, the official list of qualified electors prepared in 1955 should be used in preparing the lists to be furnished the election inspectors in your city primary elections to be held on March 6, 1956, and March 20, 1956, since the official list for 1956 will not be prepared until after said elections are held.

For the above reasons, your first question is answered in the affirmative, and your second question is answered in the negative.

We now turn to the problem presented by your letter of January 26, 1956.

Said letter quotes a part of Section 3 of Act No. 655, General Acts 1947, page 504 (Title 17, Section 90(3), 1953 Cumulative Pocket Part, Code of Alabama 1940). The remaining provisions of said section are as follows:

" Provided, as regards municipal elections, the mayor of the city or town shall cause to be made and certified such lists from the lists obtained in accordance with the provisions of Section 28 of Title 37 of the 1940 Code. Provided further that nothing in this Act shall prevent a series of lists of names of voters or electors of other boxes or voting places from being certified by the Judge of Probate on the same general list for information. A vote cast at a place other than the voting place at which the voter is entitled to vote shall be illegal."

I am of the opinion that Act No. 655, *supra*, evidences a legislative intent that, in all municipal elections, the mayor be charged with the duty of furnishing the lists of qualified electors to the election inspectors in accordance with the provisions of Title 37, Section 28, Code of Alabama 1940. I do not think it important that Section 28, *supra*, was repealed before Act No. 655,

supra, was enacted. In other words, the mayor of a municipality in this State now has the same duty under Act No. 655, supra, as he formerly had under Section 28, supra. Therefore, I am of the opinion that the mayor of the City of Dothan is charged with the duty of causing the lists of qualified electors to be delivered to the election inspectors in the primary elections to be held on March 6, 1956, and March 20, 1956. See also Act No. 465, General Acts 1945, page 699.

Very truly yours,

JOHN PATTERSON
Attorney General

February 16, 1956

Hon. Ralph W. Roberts
State Registrar
State Department of Health
C A P I T O L

Health and Health Department—Birth Certificates—Infants—
Bastardy.

1. Birth certificate of an illegitimate child cannot be corrected to show that the child is legitimate until sufficient proof of legitimation is furnished.
2. Legitimation of the illegitimate child of a father, resident of Alabama, can be accomplished only through actions precisely in accordance with Sections 10 or 11 of Title 27, Code of Alabama 1940.
3. Legitimation of the illegitimate child of a father, nonresident of Alabama, must be in accordance with the law of the father's domicile. In the absence of a judicial determination of legitimacy by a sister state, such legitimation need be recognized only as a matter of comity. Legitimation by the law of a foreign country is at most entitled to recognition as a matter of comity.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of January 25, 1956, is as follows:

"Hon. T. C. Almon, Judge of Probate of Morgan County, has been good enough to furnish us with a copy of your opinion dated January 12, 1956, which he requested. We are glad to have this opinion for our guidance but find there are several matters involved upon which we need your additional advice.

"We receive numerous requests for information as to legitimation procedures. Many of these come from former residents and men in military service in overseas stations. We feel there should be some source of information on legitimation procedures concerning babies born in Alabama and recorded in our office. To whom should we refer requests for information sought by persons interested in provisions and procedures for the legitimation of children under Section 11 and 12, Title 27, 1940 Code of Alabama?

"It is clear from your opinion that a father acknowledging paternity, or witnesses who prove the execution of the declaration of paternity, must appear before the Judge of Probate of the county of legal residence of the father. We understand that this pertains only to those cases in which the reputed father still maintains residence in some Alabama county although he may temporarily reside elsewhere. If a man, though once a permanent resident of Alabama, becomes a permanent resident elsewhere, how may his acknowledgement of paternity under provisions of the law of his state of residence be applied so as to 'correct' a birth record on file in Alabama?

"Is the State Registrar of Vital Statistics authorized to accept a declaration of paternity executed under provisions of another state and which has not passed through the offices of an Alabama judge of probate?

"If the reputed father of a child born in Alabama no longer has legal residence in Alabama, is there any way that legitimation can be accomplished under provisions of Sections 11 and 12, Title 27, 1940 Code of Alabama, if the state of his legal residence does not have this provision in its law?

"This office handles thousands of requests relative to legitimation. In 1955 more than 800 legitimations were accomplished. We have a considerable volume of this type of work and seek your advice on the questions posed and any other aspects of the subject which you feel need to be clarified for our guidance. We are essentially interested in establishing a clear-cut procedure that will have general application."

The questions which you ask concerning legitimation procedure fall into two categories:

Those dealing with the process by which an illegitimate child may be legitimated without reference to the records of the State Registrar of Vital

Statistics; and those dealing with the showing of legitimacy or illegitimacy upon the birth certificates of children born in Alabama.

Before answering the questions and outlining the procedures which I believe that the law requires, the meaning of certain words and phrases should be clarified. The first of these terms is "legitimation" which is the act of legalizing the status of a bastard so as to place a child born out of wedlock upon the same footing as those born within lawful wedlock. The other term is "declaration of paternity" which is a mere acknowledgement by a putative father of an illegitimate child that it is his. This "declaration" may be a step toward legitimation of a bastard, but it does not amount to an act sufficient to legitimate.

With reference to correction of birth certificates of children born illegitimate in Alabama to show they are now legitimate, it is my opinion that whether or not the putative father is a resident of Alabama such correction may be made only after proof of legitimation of the illegitimate infant. This office has held that legitimation is a condition precedent to changing a birth certificate to contain the name of the father. See Quarterly Report of Attorney General, Vol. 42, page 75; Vol. 54, page 132. Thus, it can be seen that legitimation is a necessary step to amending a birth certificate of an illegitimate child to show that he has now become legitimate.

The procedure for legitimating an infant whose father is a domiciliary of Alabama is clear. He must follow the procedure outlined in Sections 10 and 11 of Title 27, Code of Alabama 1940, which read as follows:

"§ 10. The marriage of the parents legitimates the children.—The marriage of the mother and reputed father of a bastard child renders it legitimate, if recognized by the father as his child."

"§ 11. Proceedings to legitimate bastard children; effect of.—The father of a bastard child may legitimate it, and render it capable of inheriting his estate, by making a declaration in writing, attested by two witnesses, setting forth the name of the child proposed to be legitimated, its sex, supposed age, and the name of the mother, and that he thereby recognizes it as his child, and capable of inheriting his estate, real and personal, as if born in wedlock; the declaration being acknowledged by the maker before the judge of probate of the county of his residence, or its execution proved by the attesting witnesses, filed in the office of the judge of probate, and recorded on the minutes of his court, has the effect to legitimate such child."

Section 10, *supra*, is clear and unequivocal and my only comment is that the recognition by the reputed father must be unambiguous. *Martin v. Martin*, 233 Ala. 310, 171 So. 734.

Section 11, *supra*, is equally clear, and it is the only way other than by the marriage and recognition outlined in Section 10, *supra*, that a father, resident, who is domiciled in Alabama can legitimate his illegitimate child so that it may enjoy all the rights of legitimacy. To take advantage of Section 11, *supra*, the father must be a resident of Alabama, execute his declaration in writing, have it attested by two witnesses, and then before the child is legitimated either the father must appear in person before the probate judge in the county of his residence and acknowledge that he has so executed the declaration, or the two attesting witnesses must appear before the probate judge and prove the document, which must then be filed and recorded. Anything else will have no effect, no matter the good intentions of the father or the hardship to the child. The case of **Johnson v. Barnett**, 240 Ala. 413, 199 So. 804, clearly indicates that all the formalities of the statutes must be followed. Thus, a serviceman who is a resident of Alabama, but is temporarily outside the jurisdiction either in a sister state or overseas, cannot legitimate his child by merely executing his "declaration of paternity," even in the form required by Section 11, *supra*, before a notary public, his commanding officer, a member of the staff judge advocate corps, or similar official.

The problem involved in legitimation when the father is a former resident of Alabama now domiciled elsewhere or has never been a resident of Alabama is somewhat different. The general rule of law is that **legitimation of a child is not dependent upon the place of residence of the child or the child's mother, but the domicile of the father at the time of the legitimating acts.** **Miller v. Miller**, 91 N. Y. 315; **Blythe v. Ayres**, 96 Cal. 532, 31 P. 915; **Lingen v. Lingen**, 45 Ala. 410. Therefore, before an illegitimate child of a nonresident father may be accepted as legitimate in Alabama, there must be proof that his father has taken the action necessary to legitimate the child in accordance with the laws of the father's domicile. Before the Registrar of Vital Statistics would be authorized to change the birth certificate to show that the child was legitimate, he would need the decree of a court of competent jurisdiction, holding the child to be legitimate, or a duly authenticated certificate of the state of the father's domicile, showing that the father had taken the actions necessary for legitimation. Such certificate or decree of a sister state would not need to be filed with the probate court in Alabama because Section 11, *supra*, has no application to the children of nonresident fathers. It should be here pointed out that recognition of legitimation by the laws of sister states is not a question of full faith and credit, but of comity. **Olmsted v. Olmsted**, 190 N. Y. 458, 216 U. S. 386, at page 395. It is my suggestion that when you receive inquiries which reveal that the father of the Alabama child is a non-resident, you should inform the inquirer that any steps toward legitimation must be taken by the father in accordance with the laws of the state of his residence and proof supplied to your office before the birth certificate in Alabama may be changed. In passing, it should be said that a judicial decree of the sister state, that a child is legitimate, is, of course, entitled to full faith and credit in Alabama.

The best course for persons wishing to right the injustice of their past errors upon their illegitimate children is to consult competent legal counsel so as not to further compound the error and allow the hoped for rights of their children to be completely frustrated. I should, therefore, make it standard procedure to advise them to consult counsel and follow carefully the law of the state of the father's domicile. It follows, of course, that if the place of domicile of the father has no provision for legitimation of bastard children, there is no way that Alabama can legitimate the child, even though it be a resident of Alabama, except by legislative action changing the present law.

Very truly yours,

JOHN PATTERSON

Attorney General

February 17, 1956

Hon. M. S. Butler
Sheriff, Montgomery County
Montgomery, Alabama

Hon. Nathan Chism
Sheriff, Tuscaloosa County
Tuscaloosa, Alabama

Sheriffs—Constitution of Alabama 1901—Costs and Fees—Mileage.

1. Sheriffs are not entitled to collect mileage under the provisions of Act No. 571, General and Local Acts 1955, page 1243, amending Sections 34 and 100, Title 11, Code of Alabama 1940, when collecting money under execution in a civil case.
2. A writ of execution in a civil case is not a mesne process but is a final process.
3. A writ of execution is not required by law to be served by delivery on a person.
4. Act No. 571, supra, does not provide a mileage fee for sheriffs serving subpoenas in criminal cases.
5. Act No. 571, supra, applies to the whole State and governs fees charged by sheriffs on salary as well as fee basis.

Opinion by Assistant Attorney General Sykes.

Gentlemen:

I have several inquiries concerning sheriffs' fees, which are as follows:

"I am requesting an official opinion from your office in regard to 'mileage fees' on judgment executions, under the new General and Local Acts No. 571, passed in the Legislature September 9, 1955.

"Under the heading of 'Civil Schedule' it stated: 'Serving summons and other mesne process and returning the same, 15¢ plus .10 per mile for each mile travelled in serving same (the underscored provision was added by Act No. 571, *supra*). When the Sheriff is required by law to serve any process or paper by delivery to a person, he shall receive .10 per mile for each mile travelled in serving same (added to Civil Schedule by Act No. 571, *supra*).'

"My question is whether the Sheriff should collect the .10 mileage fee on 'Executions' which the courts place in my hands to collect the judgments, of which I am entitled to collect the usual 5% fee on said judgment, anyway. The executions are the final outcome of a suit, and not a main suit. No person has to be 'served' a copy of same, as the courts do not issue copies. On the execution is the amount of the judgment, interest, and cost bill, to be collected from the defendant, and if same is not paid, then I place a levy on his property, real or personal, if any.

"Will you be kind enough to advise me if the new Act also included the 'executions' to be taxed with the .10 mileage fee like any of the other process, which is not specifically outlined in the new fees of mileage against other papers."

"I hear of some counties charging mileage and fees different to other counties. Some think that a salaried sheriff may charge fees and mileage different from a fee salaried sheriff.

"Are we allowed to charge mileage on serving criminal subpoenas?"

It is my opinion that when the sheriff levies an execution on a judgment in a civil case, he is not entitled to receive a mileage fee of ten cents per mile under the provisions of Act No. 571, General and Local Acts 1955, page this specific provision.

There is a special fee contained in Section 34, as amended, *supra*, for the amount of money collected. There is no mileage fee provided for under "collecting money under execution." The fee is based upon a percentage of 1243, amending Sections 34 and 100 of Title 11, Code of Alabama 1940.

Mileage is allowed, however, for the sheriff's "serving summons and other mesne process, and returning the same." Act No. 571, supra. This office has heretofore held that when the sheriff serves a writ of subpoena on a witness in a civil case, he was entitled to receive mileage fees because a writ of subpoena is a "mesne process." See opinion of Attorney General under date of December 6, 1955, to Hon. Roy O. Hill, Clerk of the Circuit Court, Houston County, Dothan, Alabama. It is my opinion, however, that a writ of execution is not a mesne process, but is a final process. Therefore, the sheriff would not be entitled to mileage under that provision of Act No. 571, supra, which allows mileage for "serving summons and other mesne process, and returning the same."

Under the provisions of Act No. 571, supra, the sheriff is also entitled to mileage when he is "required by law to serve any process or paper by delivery to a person" in a civil case. But, writs of execution are not required by law to be served upon any person. Therefore, in my opinion, the sheriff would not be entitled to collect mileage by reason of the above quoted provisions of Act No. 571, supra.

In my opinion, therefore, the fee of a certain percentage of the amount collected is the only fee appropriate when the sheriff collects money under execution.

There is no provision in Sections 34 or 100, as amended, supra, providing a mileage fee when the sheriff serves subpoenas in criminal cases. The opinion of this office rendered under date of December 6, 1955, supra, held that a writ of subpoena was a "mesne process" as that term is used in the civil schedule of fees contained in Section 34, as amended, supra. Section 100, as amended, supra, which is the criminal schedule for the fees of sheriffs, does not contain a mileage fee in connection with the serving of a subpoena or "mesne process." It is my opinion, therefore, that mileage may not be charged in criminal cases for serving a subpoena, but merely the fee "for serving each subpoena, notice, or scire facias50." (Please note that in an opinion of this office under date of November 22, 1955, to Hon. R. R. Shields, Sheriff of Pickens County, Carrollton, Alabama, it was held that the fee in criminal cases for serving a subpoena, which was raised from fifty cents to seventy-five cents by Act No. 571, supra, was not presently effective during the current term, but will be effective beginning in January, 1959.)

In reference to the statement in your inquiry that in some counties different mileage and fees are being charged from those in other counties and that some think that a salaried sheriff may charge different mileage and fees from those charged by a sheriff on a fee system, it is my opinion that the same schedule of fees is applicable in all counties regardless of whether or not the sheriff is on a salary basis. Act No. 571, supra, amending the sheriffs' schedule of civil and criminal fees, is a general act which applies to the whole State. In the opinion of this office under date of November 22, 1955, supra, it was held that certain items were presently allowable to sheriffs

while other items or fees will not be effective until the beginning of a new term for sheriffs in January, 1959. This office held that certain enumerated fees could not be effective because of constitutional provisions prohibiting the changing of compensation of certain public officers during their terms of office. Constitution of Alabama 1901, Section 68, Section 281, and Amendment XCII. It has been contended that sheriffs who are on a salary basis by virtue of a constitutional amendment could not be affected by Sections 68, 281 and Amendment XCII, *supra*. Those sections prohibit a change in the salary, fees or other compensation of the officer. Salaried sheriffs may contend that since they are required to collect their fees and pay same into the county treasury, the increased schedule provided for in Act No. 571, *supra*, could not violate those sections of the Constitution; that the increased fees or compensation, if any, accrue to the county and not to the officers.

In my opinion such contention is erroneous.

Enabling statutes or constitutional provisions requiring salaried sheriffs to pay their fees into the county treasury, in my opinion, mean that said officers should collect and pay into the treasury those fees which said officer would collect if he were not on a salary by virtue of a constitutional amendment—the same fees he would collect in the absence of a constitutional amendment and an enabling act. Therefore, the right of a sheriff, who is on a salary because of a constitutional amendment or an enabling act, to charge and collect fees which are required to be paid into the county treasury, is tested by the right of such officer to so charge and collect if there were no special constitutional provision or enabling act. It is my opinion, therefore, that the fees required to be collected and paid into the county treasury by those sheriffs who are salaried are the same as those fees collected by nonsalaried sheriffs. Hence, Act No. 571, *supra*, as interpreted by the opinion of this office under date of November 22, 1955, *supra*, governs not only those fees to be collected by nonsalaried sheriffs, but also those fees charged and collected by salaried sheriffs and remitted to the county treasury.

Yours very truly,

JOHN PATTERSON

Attorney General

February 27, 1956.

Hon. W. H. Drinkard,
Director of Conservation,
State of Alabama,
711 High Street,
Montgomery, Alabama.

Department of Conservation—Game and Fish.

If any species of fish is not designated by Title 8, Section 60, Code of Alabama 1940, to be game fish or not designated by Title 8, Section 61, Code of Alabama 1940, to be non-game fish, then the Director of Conservation can designate such omitted species of fish as either game fish or non-game fish.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of August 25, 1955, is as follows:

"Several years ago the Director of Conservation promulgated a regulation in which he designated by name the fish in this State which are to be classified as game fish. Section 60, Title 8, Code of Alabama 1940, designates by name the fish which are to be classified as game fish.

"The Director's regulation naming game fish included white lake bass, which is commonly referred to as striped bass. The legislative Act which was codified as Section 60, Title 8, Code of Alabama 1940, does not name white lake bass as a game fish. I would like to have your official opinion whether the Director of Conservation has the authority to designate by name what fish are to be classified as game fish or if he has the authority to enlarge upon the list of game fish which the Legislature designated by Section 60, Title 8, Code of Alabama 1940."

By Act No. 72, General and Local Acts 1933 (Ex. Sess.), page 67, the Legislature designated by name certain fish which were to be considered as game and non-game fish in this State. These particular provisions of said Act were later codified as Sections 60 and 61, Title 8, Code of Alabama 1940, and are quoted as follows:

"§ 60. Game fish designated.—For the purposes of this title the following shall be considered game fish: Large and small mouthed black bass, commonly called trout or green trout; bream, crappie or perch and all members of the sunfish family, including rock bass or goggle eye, calico

bass, red belly, blue gill, copper nosed, wall eyed pike, jack salmon or pickerel and white perch and brook trout, and all members of the fresh water trout, pickerel and perch families.

"§ 61. Commercial or non game fish.—The following shall be considered commercial or non game fish: Drum, buffalo, channel-cat fish and all members of the catfish family; the spotted sucker and all members of the sucker family, including the species known as red horse and black horse."

The 1939 Legislature, by Act No. 162, General Acts 1939, page 255, created a Department of Conservation. Said Act No. 162, supra, has been brought forward and codified in Title 8, Code of Alabama 1940. Title 8, Section 17, Code of Alabama 1940, is taken directly from Act No. 162, supra, and is quoted as follows:

"§ 17. Powers and duties.—The director of conservation is hereby vested with the power to enforce and administer all laws providing for the preservation, protection, propagation, and development of wild birds, wild fur-bearing animals, game fish, salt-water fish, shrimp, oysters, and other shell-fish, crustaceans, and all other species of wild life within the state, or within the territorial jurisdiction of the state, which have not been reduced to private ownership, except as otherwise provided. The director of conservation is empowered: To formulate a state wild life policy; to fix open seasons during which game birds, game and fur-bearing animals may be taken; to fix daily and season tag limits on game birds, and game animals; to designate by name what species of fish shall be game fish; to fix daily creel limits on game fishes; to regulate the manner, means, and devices for catching, or taking game fishes, game birds, game and fur bearing animals, and the manner, means, and devices for catching or taking all other species of fish not designated as game fish; to close the season of any species of game in any county or area, when upon a survey by the department it is found necessary to the conservation and perpetuation of such species, and reopen such closed season when it is deemed advisable; to designate by name what animals shall be classed as game, or fur-bearing animals, and the time, manner, means, and devices for taking same; to introduce desirable species of game, fish, and birds."

Title 8, Section 21, Code of Alabama 1940, as amended by Act No. 531, General Acts 1943, page 505, authorizes the Director of Conservation to make, promulgate and publish reasonable rules and regulations which he deems for the best interest of the conservation, protection and propagation of fish, provided such rules and regulations are not in conflict with the law and do not hamper industry. All such reasonable rules and regulations have the force and effect of law. *West v. State*, 30 Ala. App. 318, 6 So. 2d 434.

Pursuant to these laws and the specific authority conferred upon him, the Director of Conservation promulgated a regulation and published same as required by law, naming white lake bass, commonly called striped bass, as game fish in this State. This regulation appears as Regulation No. 21 on page 21 of the booklet entitled, "Alabama Laws and Regulations Relating to Game, Fish and Furbearing Animals, Season 1954-1955." This regulation is quoted as follows:

"Regulation 21. The following shall be named and designated as game fish. Large and small mouth Bass, commonly called Trout or Green Trout; White Lake Bass, commonly called Striped Bass; Bream, Crappie or Perch and all members of the sunfish family; Rock Bass, Yellow Bass, Goggle Eye, Calico Bass, Red Belly, Blue Gill, Coppernosed, Wall-eyed Pike, Jack Salmon or Pickerel, White Perch, Brook Trout, Rainbow Trout, and all members of the fresh water trout, Pickerel and Perch families."

Title 8, Code of Alabama 1940, was adopted by the Legislature on the recommendation of the Code Commission, and contains Sections 17, 60 and 61, supra. None of these sections has been amended or repealed.

Section 17, supra, gives the Director of Conservation the broad power to designate by name what species of fish shall be game fish. Section 60, supra, sets out by name the species of fish which shall be considered game fish in this State. Section 61, supra, sets out by name what species of fish shall be considered commercial or non-game fish. It is my opinion that there is a field of operation for all three of these sections. If any species of fish is not designated by Section 60, supra, to be game fish, or not designated by Section 61, supra, to be game fish, then the Director of Conservation, under the authority granted to him by Section 17, supra, can designate such omitted species of fish as either game fish or non-game fish. To put any other construction on Section 17, supra, would deprive the Director of Conservation of any authority to name any kind of fish as game or non-game, and would bring the sections into irreconcilable conflict.

Therefore, the Director of Conservation, under the power granted to him by Section 17, supra, would have the authority to designate white lake bass or striped bass as game fish, since said white lake bass or striped bass is a species which was omitted from the provisions of Sections 60 and 61, supra.

Very truly yours,

JOHN PATTERSON,

Attorney General.

March 5, 1956

Honorable T. C. Almon
Judge of Probate
Morgan County
Decatur, Alabama

License Tags — Licenses — Motor Vehicles — Opinions Overruled,
Modified, or Distinguished.

1. A station wagon, designed and used primarily for private passenger purposes, should be licensed under the provisions of Act No. 315, General and Local Acts 1951, page 610 (Title 51, Section 693 (1), 1953 Cumulative Pocket Part, Code of Alabama 1940).

2. Opinion reported in Quarterly Report of Attorney General, Vol. 49, page 77, overruled insofar as it conflicts with this opinion.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of November 9, 1955, is as follows:

"On June 30, 1953, the then Attorney General, Si Garrett, rendered an opinion to me which appears in Volume 71, of the Quarterly Reports of Opinions covering the period from April 1, 1953 to June 30, 1953, which Opinion appears on Page 57, et al, of said Volume 71.

"I still seem to have difficulty in determining the use and proper tag for station wagons.

"A salesman for the International Shoe Company has a station wagon in which he carries his samples from customer to customer, takes them out and displays them for the purpose of selling shoes. He repacks them and puts them back in his station wagon and then goes to another customer. The station wagon may be registered in his name or in the name of the International Shoe Company.

"Please give me the benefit of your official Opinion as to whether or not a station wagon used for the purpose set out above or for similar purposes, should be licensed as a passenger vehicle or a truck."

Act No. 315, General and Local Acts 1951, page 610 (Title 51, Section 693 (1), 1953 Cumulative Pocket Part, Code of Alabama 1940), reads, in pertinent part, as follows:

"Any other provision of law to the contrary notwithstanding, the license and registration fee on automobiles (the term 'automobiles' shall include, but shall not be limited to, jeeps, station wagons, and other motor vehicles of similar construction) designed and used primarily for private passenger purposes and motorcycles shall be three dollars."

Act No. 976, General and Local Acts 1951, page 1650 (Title 51, Section 692(1), 1953 Cumulative Pocket Part, Code of Alabama 1940), provides as follows:

"Section 1. Station wagons, jeeps, and similar motor vehicles which are kept for private use and are designed primarily for the transportation of passengers shall be taxed, rated, and classified on the same basis as other passenger automobiles kept for private use of the same size or weight; and where used in any statute, rule, regulation, or order, the term 'passenger automobile' or 'passenger motor vehicle' shall include station wagons, jeeps, and similar vehicles which are kept for private use as passenger cars, unless a contrary meaning is obvious."

Your attention is directed to the opinion of this office issued October 31, 1947, reported in Quarterly Report of Attorney General, Vol. 49, page 77, which contains the following language:

"A station wagon has detachable seats which can accommodate passenger operation of the vehicle, but the vehicle is equipped primarily for freight hauling. . . ."

Even though this opinion was issued prior to the passage of Act No. 315, supra, and Act No. 976, supra, and though the opinion is expressly directed to a jeep station wagon, it is my opinion that the above quoted language should be and is disapproved, and that this earlier opinion is hereby modified insofar as the general import of that language is concerned. The general concept, as well as the prevailing usage, of motor vehicles commonly referred to as "station wagons" has changed over the intervening years, and it now appears that even though they may be adopted and used for limited hauling purposes, such vehicles are designed, equipped and used primarily for private passenger purposes. Of course, there may be some motor vehicles commonly referred to as "station wagons" which are not, because of their construction, designed for private passenger purposes. This is a question of fact depending upon the type of motor vehicle and its construction.

It is my judgment that the ordinary station wagon in use today having two or three seats is designed primarily for private passenger purposes and in most instances is used primarily for private passenger purposes. Where such station wagon is not so used, then, of course, the provisions of Act No. 315, supra (three dollar tag), are not applicable.

In the opinion of this office, referred to in your letter, it was stated "that a station wagon, **designed and used primarily for private passenger purposes** and owned either by an individual or a corporation, should be licensed under the provisions of Act No. 315, supra (Section 693(1), supra)." Emphasis added.)

You do not state in the facts set out in your inquiry the type of station wagon referred to, but assuming that it is, as most of them are, the type **designed** primarily for private passenger purposes, it is my opinion that the vehicle is being **used** primarily for private passenger purposes, even though the salesman carries in it his various samples; and that, therefore, said station wagon should be licensed under the provisions of Act No. 315, supra. The individual in the instant case is using the station wagon primarily as a means of transportation; that is, getting from one location to another in order to earn his livelihood, and as a necessary incident thereto, is carrying with him the prerequisite work tools of his trade (in this case, samples of shoes).

If the individual were using the station wagon primarily to make deliveries of shoes to customers, the situation would be entirely different, and a truck license would be required.

The question is primarily one of fact under the prevailing circumstances, and must be considered by you in connection with the above-cited statutes.

Yours very truly,

JOHN PATTERSON

Attorney General

March 7, 1956

Hon. J. S. Frazer
Personnel Director
C A P I T O L

Merit System—Employees' Retirement System.

1. A person who attains the age of 70 during any month may be permitted by the Personnel Director to continue in State service until the first day of the month following his 70th birthday.
2. Such continuation in State service is in compliance by the Personnel Director with the requirement of Title 55, Section 460, Code of Alabama 1940, as last amended by Act No. 533, General and Local Acts 1953, page 740, that such person "shall be retired forthwith."

Opinion by Assistant Attorney General McQueen.

Dear Mr. Frazer:

Your request for an official opinion, bearing date of February 23, 1956, is as follows:

"Your attention is called to Title 55, Section 460, Code of Alabama 1940, as amended, which provides in part as follows:

"(c) Any member in service who has attained age seventy shall be retired forthwith; provided, that any member who is an official appointed for a term of years may remain in service until the end of the term of office for which he was appointed; and provided further, that a person who attains the age of seventy or above may be continued in the state's service, from year to year, on application of the employee approved by the Personnel Board, if evidence of physical and mental fitness is furnished."

"I am informed that it has been the practice of the Employees' Retirement System to begin payment of retirement allowances as of the first day of a month. If an employee leaves the service due to retirement during a month, no payment is made for any part of the month occurring between the actual date of leaving the service and the first of the following month.

"It has been stated to the Personnel Board that this works a hardship on an employee whose birthday is during the early part or middle of the month, and who wishes to continue working until the compulsory retirement date fixed by law. The Board has been asked to rule that the Personnel Director may approve the employee's working until the end of the month in which his birthday occurs, without going through the

formal process of approving a continuation 'from year to year', as provided by the section cited above.

"Your opinion is requested with respect to whether or not permitting an employee to continue in employment until the end of the month in which his seventieth birthdate occurs would constitute compliance with the statutory requirement that he 'be retired forthwith'."

The answer to your inquiry depends upon the meaning to be given the word "forthwith" as that word is used in Title 55, Section 460, Code of Alabama 1940, as last amended by Act No. 533, General and Local Acts 1953, page 740.

The Supreme Court in the case of *State ex rel. Gunn v. Argo*, 277 Ala. 657, 151 So. 844, in considering the meaning of the word "forthwith," as used in the statute considered in that case, said:

"'Forthwith' may have a relative meaning implying a shorter or longer period according to the connection of its use and the nature of the requirement."

As seen in the above quotation, the word "forthwith," as used in a statute, may have a relative meaning, and its exact meaning must be determined according to the connection of its use and the nature of the requirement. The requirement that a person retire "forthwith" upon attaining the age of 70, must, therefore, be construed to mean a longer or shorter period of time, as the word is used in the statute under consideration.

It is to be noted that the Legislature did not intend that the word "forthwith," as used in Section 460, *supra*, be construed to mean within two, four, six or twenty-four hours. This for the reason that under the provisions thereof, it is manifest that the word "forthwith" be construed to mean a longer period of time. In one instance, it must be construed to be to the end of the term of officials appointed for a term of office, and in another instance it must be construed to mean from year to year.

Premises considered, it is my opinion that the Legislature did not intend to work a financial hardship on a person in State service, and penalize such person, merely for the reason that he has attained the age of 70, by requiring such person to be separated from the State service immediately upon his reaching the age of 70.

You are, therefore, advised that, in my opinion, the proper and legal construction to be given the word "forthwith," as used in Section 460, *supra*, is to construe said word to mean that a person who reaches the age of 70 at any time during a month may be continued in the State service until

the first day of the month following, without the Director or the Personnel Board going through the formal process of approving a continuation in service on a year to year basis, as provided in Section 460, supra.

Yours very truly,

JOHN PATTERSON

Attorney General

March 9, 1956

Hon. W. H. Quillin, Judge
Law and Equity Court
Franklin County
Russellville, Alabama

Income Tax—Taxation—Employment, Employers and Employees.

1. If taxpayer A is the "head of a family" and he presents to his employer his affidavit proving the existence of the five factors set out in Regulation 388.3 of the Department of Revenue to constitute one a "head of a family," then his employer should grant to him his personal exemption of \$3,000 00.

2. Every employer who fails to withhold or pay to the Department of Revenue any sums required by Act No. 289, General and Local Acts 1955, page 661, to be withheld and paid shall be personally and individually liable therefor to the State of Alabama, and any sum or sums withheld in accordance with the provisions of said Act shall be deemed to be held in trust for the State.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion bearing date of January 6, 1956, is as follows:

"A, a bachelor is the head of a family in that he maintains a home and his unmarried sister, who has no income resides in the home with him. A pays all the bills in maintaining the home and the sister does the housework in the home. A supports himself and his sister and they live together in the home. A is employed by a county in Alabama at a salary of \$3000.00 per year, payable \$250.00 on the last day of each calendar

month. The constitution of Alabama provides that the head of a family is entitled to \$3,000.00 annual income which is exempt from state income tax.

"Does the employer of A have a right to withhold any part of A's salary each month as state income tax? Just how can A claim this \$250.00 each month as exempt from withholding tax for state income tax. If the blank form furnished by the Revenue Department of the State of Alabama allows married persons to claim \$3000.00 exempt from withholding tax for the State of Alabama, but does not make provisions for unmarried persons who are head of a family to claim the \$3000.00 exemptions from withholding tax, does the form comply with the law?

"Can an employer legally withhold a part of an employee's salary as state income tax, when the employee files an exemption in writing with the employer which shows that the salary is exempt from State Income Tax?

"Please let me have your opinion."

You ask: "Does the employer of A have a right to withhold any part of A's salary each month as state income tax?"

A brief review of the income tax law leading up to the present situation would be helpful. Amendment No. XXV to the Constitution of Alabama 1901 empowers the Legislature to levy an income tax and, among other things, provides that "an exemption of not less than three thousand dollars (\$3,000.00) shall be allowed to the head of a family." Said amendment is not self-executing but was implemented by the passage by the Legislature of an income tax law which is now Chapter 17 of Title 51, Code of Alabama 1940, and embraces Sections 373 to 424, both inclusive. Section 388, Title 51, Code of Alabama 1940, as last amended by Act No. 693, General and Local Acts 1953, page 945, provides that "in the case of a head of a family . . . a personal exemption of three thousand dollars" shall be allowed.

In 1955 the Legislature passed what is now known as the Withholding Tax Law (Act No. 289, General and Local Acts 1955, page 661). Section 2 of said Act provides, in part, as follows:

"(1) Every employer, as defined under the laws of the United States in effect January 1, 1956, or as subsequently may be defined, with respect to income tax collected at source, making payment of wages as defined under such laws to employees, shall deduct and withhold upon such wages a tax equal to: one and one-half percent of the first \$1,000.00 or less, three percent of the next \$2,000.00 or less, four and one-half percent of the next \$2,000.00 or less, five percent of the excess over \$5,000.00 by which the amount of such wages, less seven percent thereof or \$500.00 whichever is less and less federal income tax withheld, paid or to be paid

in the calendar year by such employer to such employee exceeds the amount of the exemptions granted to such employee under Section 388, of Title 51, of the 1940 Code of Alabama, as amended, by a certificate to be filed with the employer in such form and containing such information and detail as may be prescribed by the Commissioner, pursuant to the provisions of Section 4 of this Act."

It will be observed that the Legislature, in the quotation next hereinabove, referred to Section 388, as amended, *supra*, which is the section of the income tax law which provides for the personal exemption of \$3,000.00 to the head of a family.

Then it is apparent that the "head of a family" is entitled to the personal exemption of \$3,000.00, provided he comes within that term.

In 1952 the Department of Revenue promulgated rules and regulations with respect to the income tax law, and one of said regulations, based upon Section 388, as amended, *supra*, is Regulation 388.3, on page 85 of the pamphlet containing said regulations. Said regulation is as follows:

"Reg. 388.3. The exemption for a 'head of a family.' An individual who qualifies as a 'head of a family' is entitled to an exemption of three thousand dollars, in addition to which he receives exemptions for any persons who qualify as his dependents (See Reg. 388.2).

"An individual is a head of a family within the meaning of Sec. 388 only if he actually supports and maintains in one household one or more individuals who are closely connected with him by blood relationship, relationship by marriage, or by adoption, and where his right to exercise family control and provide for these dependent individuals is based upon some moral or legal obligation. The claimed dependents must not have an independent means and also must be actually dependent for support upon the person claiming the exemption as a head of a family, as in cases of infancy, senility, (sic) and mental or physical incompetence.

"There are thus five essential factors necessary to make one a 'head of a family':

"(1) Actual support,

"(2) Maintenance of the home,

"(3) Right to exercise family control,

"(4) Actual relationship by blood, marriage or adoption, supported by legal or moral obligation, and

- “(5) Actual dependence of the person claimed as a dependent, not mere economic convenience.”

It will be observed that the department regards as essential five factors and that, for one to come within the meaning of the term “head of family,” he must establish the existence of these five factors. It is, therefore, my opinion that taxpayer A should furnish to his employer an affidavit, and, if the affidavit covers the five essential factors hereinabove set out, then the employer should grant to him the status of “head of a family” and grant to him the exemptions provided by Section 388, as amended, supra, for a “head of a family.” However, every employer who fails to withhold or pay to the Department of Revenue any sums required by Act No. 289, supra, to be withheld and paid shall be personally and individually liable therefor to the State of Alabama, and any sum or sums withheld in accordance with the provisions of said Act shall be deemed to be held in trust for the State.

Very truly yours,

JOHN PATTERSON

Attorney General

March 26, 1956

Hon. Louie W. James
Mayor
City of Auburn
Auburn, Alabama

Municipalities—Statutes—Officers and Offices—Mayor—Salaries.

Title 37, Section 440, Code of Alabama 1940, as amended by Act No. 111, First Special Session 1956, approved February 14, 1956, places a maximum and minimum limit on salaries of mayors in this State.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of March 13, 1956, is as follows:

“The undersigned Mayor of Auburn, a municipality located in Lee County, Alabama, respectfully requests your answers to the inquiries which are set out below. All inquiries are based upon a construction of Title 37,

Section 440 of the Code of Alabama (1940), as amended by Act Number 111 of the Legislature of Alabama, Special Session, 1956. The inquiries are as follows:

"1. Are the minimum salaries specified in Section 440, as amended, mandatory upon the governing bodies of the cities affected?

"2. Is the minimum salary of \$5000 specified by Section 440, as amended, for the Mayors of cities of 10,000-20,000 population mandatory upon the governing bodies of such cities?

"3. Was it lawful for the City Council of the City of Auburn, a municipality with a population of 12,939 according to the Federal Census of 1950, to provide, within six months of the general municipal election to be held September 17, 1956, that the Mayor of the City of Auburn shall receive an annual salary of \$3000 during the four-year term commencing on the first Monday in October, 1956, and ending on the first Monday in October, 1960, assuming that an appropriate resolution to that effect was adopted by the City Council of Auburn on March 6, 1956, at a regular meeting thereof?

"I have been advised that the statute in question, Section 440 of Title 37, as amended, contains a patent ambiguity, which is this: the preliminary words of the statute provide that Mayors shall be paid salaries 'not exceeding' certain amounts, and then proceeds set certain maximum and minimum salaries for cities in Alabama, according to population. It occurs to me that the purpose of the statute is solely to place a ceiling on the compensation of the Mayor and that the specification of minimum salaries is merely directory and not mandatory."

Title 37, Section 440, Code of Alabama 1940, as amended by Act No. 111, First Special Session 1956, approved February 14, 1956, reads in part as follows:

"... The mayor shall have the powers and perform the duties as follows: He shall keep an office in the city or town and shall receive such salary as the council may prescribe which must be fixed by the council not less than six months prior to each general municipal election, not exceeding the following amounts: (1) In cities having twenty-five thousand population or more, not exceeding eight thousand five hundred dollars, and not less than six thousand dollars; (2) in cities having ten thousand and up to twenty-five thousand population, not exceeding seven thousand dollars and not less than five thousand dollars a year; (3) in cities having five thousand and up to ten thousand population, not exceeding five thousand dollars, and not less than two thousand five hundred dollars a year; (4) in cities having less than five thousand population, not exceeding three thousand dollars, and not less than one

thousand five hundred dollars a year; (5) in towns not exceeding one thousand five hundred dollars and not less than fifty dollars a year. . .”

A cardinal rule of statutory construction is that a statute should be construed as a whole to find the legislative intent. In the case of **Marengo County v. Wilcox County**, 215 Ala. 640, 112 So. 243, the Supreme Court of Alabama said:

“ . . . Conflicting intentions in one and the same act are not to be supposed, and never so regarded, unless forced upon the courts by unambiguous language. The rule of construction is to harmonize seeming conflicts. To do so, the less certain must yield to its more certain terms. . .”

Construing Section 440, as amended, *supra*, as a whole and in the light of the rules of statutory construction above mentioned, I am of the opinion that said statute expresses a legislative intent to place both a maximum and a minimum limit on salaries of mayors in this State.

A municipal ordinance or resolution, which is inconsistent with the policy of the State, as evidenced by State statutes, is void. **Hurvich v. City of Birmingham**, 35 Ala. App. 341, 46 So. 2d 577; **Town of Boaz v. Jenkins**, 32 Ala. App. 299, 25 So. 2d 394, and **Ligon v. City of Gadsden**, 21 Ala. App. 312, 107 So. 733.

Premises considered, your first and second questions are answered in the affirmative and your third question is answered in the negative.

Very truly yours,

JOHN PATTERSON
Attorney General

March 26, 1956

Hon. Ed E. Reid
Executive Director
Alabama League of Municipalities
24 South Hull Street
Montgomery, Alabama

Elections—Municipalities—Political Parties—Voters—Absentee Ballots.

1. A municipal primary election may be held at a time different from that prescribed by Title 17, Section 340, Code of Alabama 1940.

2. Duties of municipal executive committee discussed generally.
3. Respective duties of municipal executive committee and municipal officers in municipal primary elections discussed generally.
4. Qualified electors residing within the municipal corporate limits who are members of the party holding the primary may vote in municipal primary elections.
5. In municipal primary elections qualified electors may cast absentee ballots which are normally handled by the city clerk.

Opinion by Assistant Attorneys General Gallion and Sykes.

Dear Sir:

Your request for an official opinion, bearing date of March 2, 1956, is as follows:

"As you know, many of the municipalities within the State hold Democratic Party primary elections and several questions have arisen with regard to the proper and legal conduct of such primary elections upon which I shall appreciate your official opinion. These elections are held by the City Democratic Executive Committees or by the County Democratic Executive Committees and often these committees are inexperienced in the proper conduct of municipal elections and much confusion results. Generally, all questions are referred to the municipal officials for advice and decision and it frequently happens that these officials are candidates and are placed in an embarrassing position. It has been the general, if not the uniform, practice to hold these elections on a date different than the date prescribed for the primary elections for State and County officers.

"You are, of course, familiar with the provisions of Title 17 of the Code of Alabama, 1940, but to point up some of the problems that have arisen I invite your attention in particular to Sections 339, 340, 341, 343 and 348 of that Title. Section 339 provides that all primary elections shall be held under the provisions of this Chapter (Chapter 2, Title 17) and includes primary elections for 'municipal officers.' Section 340 fixes the date such primary elections are to be held 'at the expense of the State or County' but Section 343 provides that expenses of municipal primaries shall be at the expense of the municipality concerned and makes no reference to the dates for such primaries. Section 344 permits organization of party committees and vests considerable power in such committees and Sections 344 et seq. provide for notices and filings of

declarations of candidacy, etc. The provisions of Section 348 cause considerable concern because of the date requirement and the recipient of the filing; it appears that perhaps a candidate for a municipal office shall file with the Chairman of the State Executive Committee rather than with a local Committee.

"It is most desirable that municipalities be able to hold a primary election since such an election procedure permits election of nominees by a majority vote. Since it has always been customary for municipalities to hold primary elections on a different date than the primaries held under Section 340, many municipalities have not planned, and indeed could not now plan, to hold their primaries to coincide with the State and County primary elections of 1956.

"The statutes covering procedures under which City Committees hold primary elections are vague and uncertain and such committees are not sure of their responsibilities and duties. With this background I request your official opinion on the following questions:

"1. May municipal primary elections be held on dates different from the dates prescribed in Title 17, Section 340, Code of Alabama, 1940?

"2. In municipalities in which a City Executive Committee is organized and functioning, or in cities in which the County Executive Committee is acting for and on behalf of the municipality in conducting a municipal primary, what are the duties and responsibilities of such Committee in the conduct of municipal primary elections?

"3. What legal obligations exist between the Committee calling the primary election and the officers of the municipality with respect to fixing dates for qualifying and the dates upon which the primaries are to be held and where does the final legal authority rest for the determination of such dates?

"4. What persons are eligible to vote in a municipal primary election?

"5. In a municipal primary election may an elector cast an absentee ballot and if so who is charged with the responsibility of handling absentee ballots in such a primary?"

I find no specific statutory authority prescribing the manner and method of conducting municipal primary elections. The conclusions herein are reached by resorting to the general election laws, the general primary election laws, the general municipal election laws, and drawing analogies therefrom.

My answer to the first question is in the affirmative.

Title 17, Section 340, Code of Alabama 1940, requires only those primary elections which are held at the expense of the State or counties (except special primary elections) to be held on the first Tuesday in May, 1940, and every two years thereafter, etc.

Title 17, Section 343, Code of Alabama 1940, reads in part as follows:

"... provided, however, that the cost of such primary elections held for municipalities or the election of municipal officers or officials shall be paid for out of the treasury of such municipality."

No dates are mentioned in this section. This proviso is indicative of the legislative intent to permit separate primaries for municipal elections since otherwise some proration of the expenses could have been established had it been the intent of the legislature that all primaries be held together.

Title 17, Section 348, Code of Alabama 1940, as amended by Act No. 453, General Acts 1945, page 689, provides for filing a declaration of candidacy and establishes a limiting date for said filing, yet this office has held that the requirements of this section do not apply to special primary elections held in municipalities, but was evidently intended to govern candidates running in regular primary elections. (Informal opinion under date of June 11, 1952, rendered to Hon. E. K. Hanby, Jr., County Attorney of Etowah County.)

Title 17, Section 360, Code of Alabama 1940, is quoted in part:

"... All duties imposed and powers conferred upon the sheriff in said county and district elections by this section are hereby imposed and conferred on the marshal or chief of police in all municipal primary elections. . . ."

This section clearly contemplates a primary election on a date different from the primary election for State and county offices or otherwise there would be no necessity for the inclusion of the quoted sentence.

Additionally, municipalities have by custom and usage for many years conducted their primaries on dates of their own selection and without challenge as to their validity. Conceivably, much confusion would result if two primaries were conducted simultaneously and particularly is this true with the long ballots prevalent in present day primaries. It would be difficult to control and regulate voting in beats divided by the limits of the municipality, and the physical equipment available in each county for elections might well be inadequate to conduct two primaries on the same date.

Since municipal primary elections are conducted under the auspices and supervision of the city executive committees, where such committees are constituted, whereas other primaries are conducted by different committees,

and since the rule of procedure of all such committees and the conduct of all primaries are somewhat flexible, it is probable that conflicts would result should a municipal primary be held on the same date as that of the regular May primary. Therefore, the present method commends itself and should be retained. In the absence of a city executive committee, the county executive committee conducts municipal primary elections (Title 17, Section 341, Code of Alabama 1940, as amended by Act No. 678, General and Local Acts 1951, page 1169), and attempting to conduct primaries for municipalities as well as a primary for other agencies on the same date would create a most burdensome, if not impossible, task for such committee.

I conclude that it is legally permissible for municipalities to conduct their primaries on dates of their own selection, but with the limitation that they should be held far enough in advance of the general municipal election to permit the nominees to file their declaration of candidacy within the stipulated time set out in the 1945 General Municipal Election Act (Act No. 465, General Acts 1945, page 699).

In answer to your second question, it is my opinion that such a committee has full responsibility and the duty to plan, conduct and supervise the municipal primary election if one is called, to the extent hereinafter noted.

Primary elections are not compulsory. Section 341, as amended, *supra*, confers and vests on party committees within the State wide powers and authority. Primary elections are held in accordance with Chapter 2 of Title 17 (see Title 17, Section 339, Code of Alabama 1940), and the general election laws found in Title 17 and under the rules and regulations of the party state committee. In the event the above body of laws and rules do not cover a given situation that arises locally, then it is my opinion that such committee may deal with and solve the problem by application of reasonable and practical local rules duly established by the committee.

Among the duties of such committee, all to be done within the framework and under the guidance of the authority of Chapter 2 of Title 17, is the establishment of dates for the primary, the giving of ample notice thereof to the municipal governing body, the establishment of reasonable qualifying dates and the determination of qualifications of candidates, etc. The election should be conducted by the election officials nominated by the city executive committee and appointed by the municipal governing body and the ballots tabulated by such election officials. The committee should canvass and declare the results.

In answer to your third question, I refer you to the answer to the second question, your attention being invited particularly to the first paragraph thereof, and the paragraph immediately above.

In answer to your fourth question, I refer you to Title 17, Section 347, Code of Alabama 1940, which is in pertinent part as follows:

"§ 347. Who may vote in primary.—All persons who are qualified electors under the general laws of the State of Alabama, and who are also members of a political party entitled to participate in such primary election, shall be entitled to vote therein and shall receive the official primary ballot of that political party, and no other; but every state executive committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary elections, or to be candidates therein, or to otherwise participate in such political parties and primaries; and the qualifications of electors entitled to vote in such primary election shall not necessarily be the same as the qualifications for electors entitled to become candidates therein. . ."

Of course, only those qualified electors who reside in the corporate limits of the municipality are entitled to vote.

In answer to your fifth inquiry, it is my opinion that an elector may cast an absentee ballot. I refer you to Act No. 424, General and Local Acts 1949, page 601 (Sections 9 and 17 of which have been amended by Act No. 4, General and Local Acts 1951, page 43, and Act No. 733, General and Local Acts 1953, page 993, respectively). Section 18 of Act No. 424, supra, provides that the city clerk shall handle absentee ballots, or in the event the city clerk is a candidate, the city council shall appoint a person in his stead.

Very truly yours,

JOHN PATTERSON
Attorney General

March 27, 1956

Hon. Hardy Riddle
Judge of Probate
Talladega County
Talladega, Alabama

Census—Judges of Probate—Municipalities—Statutes—Licenses—Taxation.

A census properly proclaimed and certified pursuant to Act No. 845, General and Local Acts 1953, page 1136, controls the amount of state and county licenses collected by the judge of probate, where the amount of the licenses is based on population.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of March 14, 1956, is as follows:

"There has been recently completed, but not yet proclaimed, published or certified, a census of the City of Talladega. This census was a federal census conducted by the Bureau of the Census, U. S. Department of Commerce.

"Some doubt has arisen as to whether this census would or would not effect a change in the amount of certain state and county licenses collected thru this office, where the amount of the licenses is based on population. That is of course where the increase in population was such as to change the amount.

"I would like to have an opinion from your office specifically settling the matter.

"Title 1, Section 14, states 'this section shall not apply to any law which provides for the levying or collection of license taxes'—'the population as disclosed by any federal **decennial** census'—'shall be used.' Act No. 845 of Acts of 1953 page 1136 provides 'this act shall be used'—'where such levy or collection of license taxes is based on population'—'as soon as such census is certified.'"

Title 1, Section 14, Code of Alabama 1940, was amended by Act No. 174, General and Local Acts 1951, page 415, to read as follows:

"Reclassification date.—The ninetieth day after the first day of the first regular legislative session held next after the publication by the federal government of the regular federal decennial population census for Alabama is hereby fixed as the date for any reclassification under any law requiring classification based on such said census. The provisions of the preceding sentence shall not apply to any law passed by the 1951 Regular Session of the Legislature of Alabama. The provisions of this section shall not apply to any law which provides for the levying or collection of license taxes on a population basis or the distribution of State and County collected or administered revenues or funds on a population basis; **and the population as disclosed by any federal decennial census, as soon as the same is proclaimed, published or certified by the Director of the United States Census Bureau, shall be used in administering any such law.**" (Emphasis supplied.)

Act No. 845, General and Local Acts 1953, page 1136, reads in part as follows:

"Section 1. Any city or town may, by ordinance, provide for a census of all persons residing within the corporate limits of such city or town to be taken by the bureau of the Census of U. S. Department of Commerce, but no such census may be conducted more often than every five years.

"Section 2. Any census taken under the provisions of this act shall be used only as the basis for any law which provides for the levy or collection of license taxes where such levy or collection of license taxes is based on population, and as the basis for any law which provides for the distribution of state-collected or county-collected licenses, excises, revenues, or funds where such distribution is administered or distributed on a population basis. Such census shall be used in administering any such laws as soon as such census is certified by the Bureau of the Census, U. S. Department of Commerce, and proclaimed by the governing body of the city or town providing for the taking of the census. . .

"Section 4. All laws or parts of laws which conflict with this Act are repealed."

The census of the City of Talladega mentioned in your request was taken pursuant to the provisions of Act No. 845, supra.

A repealing clause is a valuable aid in determining what the language of a statute really means. It certainly makes clear the intention of the Legislature to repeal those parts of other laws in conflict with the law to which the repealing clause is attached. **Davis et al. v. Browder**, 231 Ala. 332, 165 So. 89. For this reason, I am of the opinion that Section 4 of Act No. 845, supra, repealed those parts of Section 14, as amended, supra, which conflict with the provisions of Act No. 845, supra.

Therefore, you are advised that the census of the City of Talladega taken pursuant to the provisions of Act No. 845, supra, will control the amount of state and county licenses collected by you where the amount of such licenses is based on population when such census is properly proclaimed and certified. See comparative authority contained in Quarterly Report of Attorney General, Vol. 73, page 66.

Very truly yours,

JOHN PATTERSON

Attorney General

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